



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2005

Ms. Maleshia B. Farmer
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2005-00259

Dear Ms. Farmer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 216666.

The City of Fort Worth (the "city") received a request for a former police office's full personnel file, civil service file, and photo. You state that you will release a majority of the records, but you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.115 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

You claim that the information in Exhibit F is excepted from disclosure under federal law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and

¹Although you did not timely raise section 552.115, this provision constitutes a compelling reason to withhold information, and we will address your arguments on this issue. See Gov't Code §§ 552.301, .302.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

encompasses information protected by other statutes, such as federal law. Federal tax return information, including taxpayer identification numbers, is confidential under federal law. 26 U.S.C. § 6103(a); *see also* Open Records Decision No. 600 (1992). Therefore, the city must withhold the information in Exhibit F under section 552.101 in conjunction with federal law.

You next claim that the information in Exhibit H is excepted from disclosure under section 552.101 in conjunction with Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, also is to be treated as a confidential medical record. *See* 42 U.S.C. §§ 12101 *et seq.*; 29 C.F.R. § 1630.14(c); Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information that the city must withhold in Exhibit H under section 552.101 in conjunction with the ADA.

You also claim that Exhibit C is excepted from disclosure under section 552.101 of the Government Code. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).³ *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.- Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release

³Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See Id.* §§ 143.051-.055.

under chapter 552 of the Government Code. *See Id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to an officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.-- San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

You state that the Internal Affairs records in Exhibit C are maintained in the police department's internal file concerning the named officer pursuant to section 143.089(g). We therefore conclude that the information in Exhibit C is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101.

We now consider your argument under section 552.101 of the Government Code for the information in Exhibit D, which contains information obtained from a polygraph examination. We note that Exhibit H also contains information about a polygraph examination. Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. *See* Occ. Code § 1703.001. *See* Occ. Code § 1703.001. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. Therefore, the city must withhold the information in Exhibit D in its entirety and the marked information in Exhibit H under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

You also claim that the information in Exhibit G is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 encompasses information protected by section 1701.306 of the Occupations Code, which provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Exhibit G contains declarations required by the Texas Commission on Law Enforcement Officer Standards and Education. We find that Exhibit G is confidential under section 1701.306 of the Occupations Code, and must be withheld under section 552.101 of the Government Code.

You claim that the fingerprints submitted in Exhibit I are excepted from disclosure under section 552.101 in conjunction with sections 560.001, 560.002, and 560.003 of the Government Code. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, .002, .003. It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the city must withhold the fingerprints in Exhibit I under section 552.101 in conjunction with section 560.003 of the Government Code.

You claim the information in Exhibit E is subject to section 552.101 of the Government Code and the doctrine of common law privacy. The common law right of privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to

the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed Exhibit E and agree that the city must withhold this information under section 552.101 on the basis of common law privacy. We have also marked information in Exhibit H that must be withheld under section 552.101 on the basis of common law privacy.

You next claim that Exhibit J is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not

intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). After reviewing your arguments and the information at issue, we conclude that Exhibit J constitutes a privileged attorney-client communication and may be withheld under section 552.107 of the Government Code.⁴

Finally, you claim that Exhibit K, a birth certificate, is excepted from disclosure under section 552.115 of the Government Code. This section provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that “a birth record is public information and available to the public on and after the 75th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official.” Since section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the city may not withhold the certificate of birth registration in the personnel file pursuant to that provision. *See Open Records Decision No. 338 (1982)*.

We note that Exhibits H, I, and K contain personal information about the police officer at issue. Section 552.117(a)(2) of the Government Code protects information that reveals the officer’s current and former home addresses and telephone numbers, social security number, and information that reveals whether the officer has family members.⁵ *See Open Records Decision No. 622 (1994)*. We have marked the documents in Exhibits H, I, and K accordingly.

In summary, the city must withhold Exhibit F under section 552.101 of the Government Code in conjunction with federal law. We have marked the information the city must

⁴Because we are able to reach this determination, we need not consider your argument under section 552.111 of the Government Code for the information in Exhibit J.

⁵The Office of the Attorney General will raise a mandatory exception like section 552.117(a)(2) on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

withhold in Exhibit H under section 552.101 in conjunction with the ADA. Exhibit C must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Exhibit D and the marked polygraph information in Exhibit H must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code. The city must withhold Exhibit G under section 552.101 in conjunction with section 1701.306 of the Occupations Code. The marked fingerprint information in Exhibit I must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code. Exhibit E and the marked information in Exhibit H must be withheld under section 552.101 on the basis of common law privacy. Exhibit J may be withheld under section 552.107 of the Government Code. The marked personal information in Exhibits H, I, and K must be withheld under section 552.117(a)(2) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Elizabeth A. Stephens', written in a cursive style.

Elizabeth A. Stephens
Assistant Attorney General
Open Records Division

EAS/seg

Ref: ID#216666

Enc. Submitted documents

c: Mr. Scott Gordon
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(w/o enclosures)